

Halperin



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: ATD-American Company

File: B-227324

Date: July 28, 1987

DIGEST

Protest that specifications in an invitation for bids are unduly restrictive is untimely where the protest was filed after bid opening. Protester's alleged reliance on oral advice from procuring agency personnel that bid taking exception to IFB requirements will not be rejected as nonresponsive was unreasonable where such advice was inconsistent with the clear meaning of the specifications and with the fundamental principle that an agency may not solicit bids on one basis and then make award on another basis.

DECISION

ATD-American Company protests the award of a contract to any bidder under invitation for bids (IFB) No. S-125PI-002-7, issued by Unicor Federal Prison Industries, Department of Justice, for the procurement of 500,000 terry cloth towel blanks. ATD contends that the IFB's requirement that the towel blanks have two selvage (woven) sides unduly restricts competition.

We dismiss the protest.

The IFB was issued on April 20, 1987, and required bidders to offer towel blanks which meet the standards of federal specification DDD-T-551K for type I, class I, style "A" towels (selvage edge both sides). The IFB further specified that each towel blank shall have "2 selvage sides woven with a 3 x 3 weave or a terry weave selvage."

Prior to the bid opening date, May 20, 1987, ATD contacted Unicor to inquire whether it would be allowed to bid style "C" towel blanks which have hemmed edges on both sides rather than selvage edges. Since the contracting officer was not available due to illness ATD spoke with other Unicor personnel. Because ATD stated that they could not bid on

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style "A" towels blanks, the Unicor representatives informed ATD that it should bid on style "C" and when the contracting officer returned, he would evaluate the situation to decide whether ATD's bid could be accepted.

When the contracting officer returned, he evaluated the bids and rejected ATD's bid as nonresponsive because ATD bid style "C" rather than style "A" as required. According to the contracting officer, style "C" towel blanks are not acceptable because, due to the hemmed rather than selvaged edges of style "A," many problems are created in the production of finished towels by Unicor inmates. The contracting officer states that Unicor does "not have the extra time or staff that would be required to spend with an inmate to use style . . . C towel blanks." In addition, the contracting officer comments that due to the problems involved in sewing style "C" towel blanks, a high rejection rate is experienced.

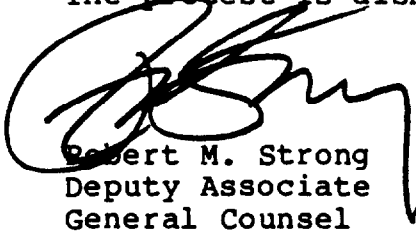
ATD argues that the IFB is unduly restrictive because it requires bids for only style "A" towel blanks. ATD contends that either style "A," "B" or "C" would meet the government's needs and that styles "B" and "C" are currently being supplied to other Unicor facilities throughout the United States. Although Unicor rebuts ATD's contentions concerning the restrictiveness of the specifications, we will not address the merits of this matter because ATD's contentions are untimely raised.

Our Bid Protest Regulations provide that protests based upon alleged improprieties in a solicitation that are apparent prior to bid opening must be filed prior to bid opening. 4 C.F.R. § 21.2(a)(1) (1986); Hi-Tech, B-225855, Feb. 18, 1987, 87-1 C.P.D. ¶ 184. Notwithstanding ATD's stated belief that Unicor would not reject ATD's bid, the solicitation restriction complained of here was clearly stated in the IFB and ATD did not protest against this provision until after bid opening. Moreover, even assuming that Unicor representatives did say that ATD's bid would not be rejected even though ATD bid style "C" rather than style "A," ATD's apparent decision to forego protesting the IFB restriction and instead to rely on an oral representation that clearly conflicted with the IFB and the fundamental principle that an agency may not solicit bids on one basis and then make award on another basis was unreasonable. See Red Fox Industries, Inc., B-225696, Feb. 20, 1987, 87-1 C.P.D. ¶ 307; Westinghouse Electric Corp., B-224492, Aug. 6, 1986, 86-2 C.P.D. ¶ 165.

Finally, ATD argues that the "unavailability of the contracting officer made it impossible to make a request in writing to [Unicor] and have it reach the correct authority

before bid opening." However, the unavailability of the contracting officer does not excuse a protester from filing a written protest with either the contracting agency or with GAO in a timely fashion. See Federal Acquisition Regulation (FAR), 48 C.F.R. § 33.101 (1986); 4 C.F.R. §§ 21.1(b) and 21.2; Data Processing Services, B-225443.2, Dec. 18, 1986, 86-2 C.P.D. ¶ 683.

The protest is dismissed.



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